

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COMMODITY FUTURES TRADING
COMMISSION,

Plaintiff,

v.

ARCHEGOS CAPITAL MANAGEMENT, LP
and PATRICK HALLIGAN,

Defendants.

1:22-cv-03401 (JPO)

**DECLARATION OF ERIC A. HIRSCH IN SUPPORT OF
DEFENDANT ARCHEGOS CAPITAL MANAGEMENT, LP'S
MOTION TO DISMISS THE AMENDED COMPLAINT**

ERIC A. HIRSCH hereby declares pursuant to 28 U.S.C. § 1746:

1. I am a Counsel with the law firm of King & Spalding LLP, attorneys for Defendant Archegos Capital Management, LP ("ACM") in the above-captioned action, and a member in good standing of the bar of this Court. I respectfully submit this Declaration in support of ACM's motion to dismiss the Amended Complaint (Dkt. #33).

2. Attached as Exhibit 1 is a copy of the January 22, 2013 Order Instituting Administrative Proceedings, Making Findings, And Imposing Remedial Sanctions by the Securities and Exchange Commission ("SEC") in the action captioned, *In the Matter of Sung Kook Hwang*, Release No. 3535, File No. 3-15181 (Sec. & Exch. Comm'n, Jan. 22, 2013).

3. Attached as Exhibit 2 is a copy of the July 29, 2021 Credit Suisse Group Special Committee of the Board of Directors Report on Archegos Capital Management, attached as Ex. 99.2 to the Form 6-K publicly filed by Credit Suisse with the SEC on July 29, 2021.

4. Attached as Exhibit 3 are excerpts from the Brief of Amici Curiae filed by the International Swaps and Derivatives Association, Inc. and Securities Industry and Financial Markets Association in the matter captioned, *CSX Corp. v. Children's Inv. Fund Mgmt. (UK) L.L.P.*, 08 Civ. 2764 (LAK), (S.D.N.Y. June 2, 2008).

5. Attached as Exhibit 4 is a copy of excerpts from the November 2007 Consultation Text titled, "Disclosure of Contracts for Difference," made publicly available by the United Kingdom Financial Services Authority.

6. Attached as Exhibit 5 is a copy of a May 24, 2022 *Bloomberg* article titled, "Take the Swaps off the Balance Sheet," by Matt Levine.

7. Attached as Exhibit 6 is a copy of a chart listing the closing prices of the S&P 500 from March 20, 2020 to March 19, 2021.

8. Attached as Exhibit 7 is a copy of a chart listing the closing prices of the Dow Jones Industrial Average from March 20, 2020 to March 19, 2021.

9. Attached as Exhibit 8 are copies of excerpts from the Form ADVs filed by Hudson Bay Capital Management LP, Paloma Partners Management Company, and Samlyn Capital, LLC on March 30, 2022, March 31, 2022, and March 30, 2022, respectively.

10. Attached as Exhibit 9 is a copy of a March 24, 2021 *Bloomberg* article titled, "China Considers Creating State-Backed Company to Oversee Tech Data," by Lulu Yilun Chen.

11. Attached as Exhibit 10 are copies of the reports of proceedings before U.S. Magistrate Judge Jennifer E. Willis reflecting Sung Kook (Bill) Hwang's and Patrick Halligan's not guilty pleas in the action captioned *United States v. Sung Kook (Bill) Hwang and*

Patrick Halligan, Case No. 22-cr-240 (S.D.N.Y.).

12. Attached as Exhibit 11 is a copy of an “FAQ” posted by the SEC on its website and prepared by the Staff of the SEC’s Division of Trading and Markets titled “Frequently Asked Questions Regarding Security-Based Swaps,” available at <https://www.sec.gov/files/faqs-security-based-swaps.pdf>, last visited on October 26, 2022.

Exchange Traded Funds

13. Attached as Exhibit 12 is a copy of excerpts of the January 16, 2020 Prospectus for the SPDR S&P 500 ETF Trust.

14. Attached as Exhibit 13 is a copy of excerpts of the January 14, 2021 Prospectus for the SPDR S&P 500 ETF Trust.

15. Attached as Exhibit 14 is a copy of excerpts of the January 31, 2020 Prospectus for the Invesco QQQ TrustSM.

16. Attached as Exhibit 15 is a copy of excerpts of the January 31, 2021 Prospectus for the Invesco QQQ TrustSM.

17. Attached as Exhibit 16 is a copy of excerpts of the January 31, 2020 Summary Prospectus for the Financial Select Sector SPDR Fund.

18. Attached as Exhibit 17 is a copy of the December 30, 2019 Summary Prospectus for the iShares MSCI Emerging Markets ETF.

19. Attached as Exhibit 18 is a copy of the December 30, 2020 Prospectus Supplement and excerpts of the December 30, 2020 Prospectus for the iShares MSCI Emerging Markets ETF.

Archegos' Swaps Agreements

Credit Suisse

20. Attached as Exhibit 19 is a copy of the February 4, 2005 Credit Suisse First Boston Portfolio Swaps (Standard Terms) Annex (the “2005 CS Swaps Agreement”) between Credit Suisse First Boston (Europe) Limited and Tiger Asia Fund, L.P. (the name that Archegos Fund, LP (“Archegos”) formerly did business under). The 2005 CS Swaps Agreement was produced to the CFTC in its investigation of Archegos with the bates numbers Archegos-CFTC-SEC 035540-35558.

21. Section 9.1 of the 2005 CS Swaps Agreement states: “On any Business Day when CSFB or the Counterparty wishes to close any Contract (whether in whole or in part), it shall give notice of that fact to the other party (by telephone or as otherwise agreed between the parties) specifying the Security and the proportion of such Contract it wishes to close.” Section 9.6 of the 2005 CS Swaps Agreement states: “If CSFB or the Counterparty gives notice to close only a portion of the Contract Quantity, then the provisions of this Section shall apply only to that portion. The remainder of the Contract Quantity shall continue to be governed by these Standard Terms.”

22. Attached as Exhibit 20 is a copy of the December 15, 2020 Credit Suisse Portfolio Swaps (Standard Terms) Annex (the “2020 CS Swaps Agreement”) between Credit Suisse International and Archegos Fund, LP. The 2020 CS Swaps Agreement was produced to the CFTC in its investigation of Archegos with the bates numbers Archegos-CFTC-SEC 002776-2805.

23. Section 11(i) of the 2020 CS Swaps Agreement states: “Unless otherwise specified in the Confirmation for a particular Transaction, on any Exchange Business Day

when CS or the Counterparty wishes to terminate any Transaction (whether in whole or in part), it shall give one (1) Exchange Business Day's notice of that fact to the other party (by telephone or as otherwise agreed between the parties) specifying the proportion of such Transaction it wishes to terminate; subject to Section 10 hereto."

24. Section 11(v) of the 2020 CS Swaps Agreement further states, "If CS or the Counterparty gives notice to terminate only a portion of the Number of Shares in respect of a Share Swap Transaction or the Number of Units in respect of an Index Swap Transaction or an Index Basket Swap Transaction, then the provisions of this Section shall apply only to that portion of the relevant Transaction. In the event that a Transaction is terminated only in part, CS shall make any necessary adjustments to the Number of Shares in respect of a Share Swap Transaction or the Number of Units in respect of a Share Basket Swap Transaction, an Index Swap Transaction or an Index Basket Swap Transaction. The remainder of the transaction shall continue to be governed by these Standard Terms."

Deutsche Bank

25. Attached as Exhibit 21 is a copy of the November 20, 2003 Master Confirmation for Equity Swaps Transactions between Deutsche Bank AG London and Tiger Asia Fund L.P. (the name that Archegos formerly did business under) (the "Deutsche Bank Swaps Agreement"). The Deutsche Bank Swaps Agreement was produced to the CFTC in its investigation of Archegos with the bates numbers Archegos-CFTC-SEC 002869-2889.

26. The Deutsche Bank Swaps Agreement, on page 1, defines the transactions that are the subject of the agreement to be "Portfolio Swap Transactions, and "a group of Portfolio Swap Transactions sharing common terms" as a "Portfolio." Section 2(e) of the Deutsche Bank Swaps Agreement states, "either party may upon three (3) Scheduled Trading Days' prior

notice to the other party terminate a Transaction in a Portfolio prior to the relevant Termination Date by designating an earlier Scheduled Trading Day as the ‘Optional Early Termination Valuation Date’.....”

Goldman Sachs

27. Attached as Exhibit 22 is a copy of the November 25, 2020 Goldman Sachs Master Confirmation Agreement for Synthetic Equity Products between Goldman Sachs International and Archegos Fund LP (the “Goldman Sachs Master Confirmation Agreement”). The Goldman Sachs Master Confirmation Agreement was produced to the CFTC in its investigation of Archegos with the bates numbers Archegos-CFTC-SEC 004008-4030.

28. The Goldman Sachs Master Confirmation Agreement states, on page 14, that a “party may on any Exchange Business Day ... close any Transaction, in whole or in part by giving notice to (i) in the case of [Archegos], at least (1) one Exchange Business Day prior to the Early Unwind Date and (ii) in the case of GS, giving notice to [Archegos] at least (5) five Exchange Business Days prior to the Early Unwind Date. Such notice shall specify the Number of Shares, Number of Units, or Number of Baskets (as applicable) to be terminated”

Jefferies

29. Attached as Exhibit 23 is a copy of the November 16, 2017 Share Swap and Share Basket Swap Master Confirmation Agreement between Jefferies Financial Products, LLC and Archegos Fund, L.P. (the “Jefferies Master Confirmation Agreement”). The Jefferies Master Confirmation Agreement was produced to the CFTC in its investigation of Archegos with the bates numbers Archegos-CFTC-SEC 002948-2985.

30. Section 4(a) of the Jefferies Master Confirmation Agreement states, “Either

party may, with at least one Scheduled Trading Day's notice, elect to early terminate a Transaction in whole or in part (and, for a Share Basket Swap Transaction, any partial early transaction shall be for a pro rata portion of the relevant Basket), in its sole discretion”

Morgan Stanley

31. Attached as Exhibit 24 is a copy of the May 18, 2004 Amendment to the ISDA Master Agreement dated as of November 8, 2001 between Morgan Stanley & Co. International Limited and Tiger Asia Fund LP (the name under which Archegos formerly did business) (the “Amendment to the Morgan Stanley Swaps Agreement”). The Amendment to the Morgan Stanley Swaps Agreement was produced to the CFTC in its investigation of Archegos with the bates numbers Archegos-CFTC-SEC 014178-14199. The Amendment to the Morgan Stanley Swaps Agreement adds the terms of the “Automated Transaction Supplement” (defined as the “ATS”) to the ISDA between the parties, which is attached as an exhibit to the Amendment.

32. Section 5(h) of the ATS states that “Acceptance by [Morgan Stanley] of an ATS Unwind Request shall constitute an agreement between the parties to adjust the relevant ATS Transaction(s) by reducing the Number of Shares by the number specified by [Archegos] in such request”

Nomura

33. Attached as Exhibit 25 is a copy of the March 18, 2016 Amended and Restated Synthetic Prime Brokerage Master Confirmation between Nomura International plc and Archegos Fund, LP (the “2016 Nomura Master Confirmation”). The 2016 Nomura Master Confirmation was produced to the CFTC in its investigation of Archegos with the bates numbers Archegos-CFTC-SEC 0403752-403862.

34. Section 3.1(a) of the 2016 Nomura Master Confirmation states, “[Archegos]

may request on any Scheduled Trading Day after the date of this [agreement] that Nomura enter into an SPB Transaction or effect an SPB Transaction Unwind (each an ‘SPB Transaction Request’). Such SPB Transaction Request shall specify, at a minimum, the number of Units, the Underlying(s) and whether such transaction is to be an SPB Transaction ... or an SPB Transaction Unwind.” Schedule 3 of the 2016 Nomura Master Confirmation defines “Units” to include, “in the case of an Underlying that is Custom Basket Shares, the number of Shares of each Issuer included in a single SPB Custom Basket.”

35. Attached as Exhibit 26 is a copy of the March 10, 2021 SPB Master Confirmation between Nomura Global Financial Products, Inc. and Archegos Fund, LP (the “2021 Nomura Master Confirmation”). The 2021 Nomura Master Confirmation was produced to the CFTC in its investigation of Archegos with the bates numbers Archegos-CFTC-SEC 011551-11599.

36. Section 2.1(a) of the 2021 Nomura Master Confirmation states, “[Archegos] may request on any Scheduled Trading Day after the date of this [agreement] that Nomura enter into an SPB Transaction or effect an SPB Transaction Unwind (each an ‘SPB Transaction Request.’). Such SPB Transaction Request shall specify, at a minimum, the number of Units, the Underlying(s) and whether such transaction is to be an SPB Transaction ... or an SPB Transaction Unwind.” Schedule 3 of the 2021 Nomura Master Confirmation defines “Units” to include, “in the case of an Underlying that is Custom Basket Shares, the number of Shares of each Issuer included in a single SPB Custom Basket.”

UBS

37. Attached as Exhibit 27 is a copy of the February 4, 2020 UBS Portfolio Swap Master Confirmation Agreement between UBS AG and Archegos Fund, LP (the “UBS Master

Confirmation Agreement”). The UBS Master Confirmation Agreement was produced to the CFTC in its investigation of Archegos with the bates numbers Archegos-CFTC-SEC 003516-3535.

38. Page 15 of the UBS Master Confirmation Agreement States, under the heading “Basket Swaps,” “Counterparty may remove one or more Shares from the Basket at any time, subject to UBS’s prior consent, which consent shall not be unreasonably withheld.”

Dated: November 1, 2022
New York, New York

/s/ Eric A. Hirsch
Eric A. Hirsch